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Supreme Court of the United States

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

v.

R. L. BRYANT, Administrator of M. L. Bryant, Deceased, Respondent.

REPLY BRIEF OF RESPONDENT'S ATTORNEY UPON HIS MOTION TO DISMISS.

CHARLES CURRY,
For Respondent.

R. B. STEPHENSON,
CURRY CARTER,
Of Counsel.

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I.

The Erroneous Assumption of Defendant That the Evidence in the Record Showing That Bryant Was Discharged From Defendants Service, Two Days Before the Shooting, Cannot Be Considered on Account of Variance.

(The petitioner is referred to in this brief as the

defendant, the respondent as the plaintiff, and the deceased as Bryant.)

The defendant has presented its case upon the erroneous assumption that the evidence in the record, that Bryant was discharged on Saturday, two days before the shooting complained of, cannot be considered, because under the allegations of the declaration this evidence could not be admitted. This assumption of the defendant is without foundation under the settled practice in our State.

This case was founded on the testimony of the defendant's section employees. It was not known by the plaintiff, or, his attorneys, at the time this action was brought, that the defendant's foreman, Dodson, had discharged Bryan on Saturday, two days before the shooting occurred. This was developed by the testimony of Dodson taken in the form of a deposition, at the Virginia Penitentiary, shortly before the trial. There was no objection to the testimony of Dodson on account of variance, either at the time of the taking of the deposition, or at the trial. If such objection had been made, the plaintiff, or, the trial court, would have had an opportunity to act under the Virginia Statute, Section 6250 of Virginia Code, 1919, which provides as follows:

> "If, at the trial of any action or motion, there appears to be a variance between the evidence and allegations or recitals, the court, if it consider that substantial justice will be promoted and that the opposite

party cannot be prejudiced thereby, may allow the pleadings to be amended, on such terms as to the payment of costs or postponement of the trial, or both, as it may deem reasonable. Or, instead of the pleadings being amended, the court may direct the jury to find the facts, and, after such finding, if it consider the variance such as could not have prejudiced the opposite party, shall give judgment according to the right of the case."

There was never any objection made to the testimony of Dodson relating to Bryant's discharge on Saturday, nor was there any motion to strike out his testimony, on account of variance.

Dodson was asked (R. 84) "Q. Do you know whether Mr. Bryant had been discharged from the C. & O. service when he was mortally wounded." Then follows defendant's objections as follows: "By Mr. Perry; This question and any answer is objected to on the ground that the question is leading, that the witness is asked to state a conclusion of law, and that the witness' statement cannot bind the defendant in this case since they are made long after the occurrence."

"Overruled. Defendant excepts."

The witness answered: "Yes, sir."

Q "When was he discharged?
A He was discharged on Saturday.

BY MR. PERRY: Same objection.

Overruled.

Q On what day was the shooting?
A On Monday morning.
Q On the following Monday morning?
A Yes, sir, the following Monday morning.
Q Who discharged him from the C. & O. service?
A I did myself."

It will be observed that the record is a clean record as relating to bills of exceptions or certificates of exceptions.

It was never intimated at the trial that there was any objection to the evidence on account of variance.

In defendant's demurrer to the evidence it was required under the Virginia Statute, Section, 6117, set out in appendix to defendant's brief page, 22, to state specifically the grounds of demurrer relied on, and the grounds of demurrer to the evidence appear in the record, 160-161, and the Court will search in vain for any intimation or suggestion in the seven grounds of demurrer that a variance was relied on. More than this, defendant was required under our practice to state the errors that it relied on in its petition to the Supreme Court of Appeals

of Virginia for a writ of error, and it assigned only two grounds (R. 4-5):

> "The Circuit Court erred in overruling the defendant's demurrer to the evidence for the reasons:
>
> First. The defendant cannot be held liable under the Federal Employer's Liability Act, which applied here to the exclusion of any other statute or rule of law since the intestate's injury and death did not result from the negligence of any of the defendant's officers, agents, or employees.
>
> Second. Dodson, who shot the plaintiff's intestate, was not acting within the scope of his employment by the defendant, or in the prosecution of the defendant's work, in attacking and injuring the plaintiff's intestate."

It is obvious that if there was a variance, that it was waived by the defendant, and we feel that it is hardly fair for the defendant to present its case on the theory that evidence in the record that Bryant was discharged on Saturday, is out of the case, and cannot be considered.

It is said in Burks Pl. & Pr., (2d. Ed) Page 588 the standard authority on Common law pleading and practice in Virginia:

> "If, however, notwithstanding the variance, no objection was made to the admissibility of the evidence, and no motion was made to exclude on account of the supposed variance, the objection must be considered on appeal as waived."

It was said by the Supreme Court of Appeals of Virginia in the case of Conrad v. Ellison-Harvey Co. 120 Va. 455 at p. 462-463:

> "At no time during the progress of the trial was there, so far as the record shows, any intimation that the defendant relied upon a variance between the declaration and the proof, or upon the insufficiency or inaptness of the evidence to sustain a recovery upon the common counts. Parties are not permitted to make one objection to evidence in the trial court and another and different one in the appellate court, but are regarded as having waived all objections save those specifically pointed out ***. This statute, (Section 3384, Code 1887, now Section 6250, Code 1919), has always, and most properly, been regarded with favor, and construed with liberality by the courts of this State; and its terms would have fully met the condition now complained of by the defendant. Having failed to avail itself of the remedy thus provided, or to give the plaintiff or the

> court the opportunity to invoke it, the defendant cannot now take advantage of the irregularity which the statute would have cured. This conclusion is in accord with the well settled policy and repeated decisions of this Court." Citing numerous cases.

Defendant's counsel in cross examining Dodson assumed that Bryant had been discharged by Dodson on Saturday. Dodson was asked on cross examination (R. 88):

> "Q Whereabouts were you on the preceding Saturday when you discharged Bryant?
>
> A Right east of the tunnel."

And then defendant's counsel proceeded to examine Dodson about discharging Bryant on Saturday. The defendant called L. E. Crance as its witness, and in examining Mr. Crance it was assumed by defendant's counsel that Bryant had been discharged. He was asked (R. 138):

> "Q How was Bryant employed before he was discharged; what did he do, or what did he work at?
>
> A As a track laborer."

And (R. 144) defendant's counsel brought out from Mr. Crance on examination in chief that he had directed Dodson to discharge Bryant on Saturday before the shooting.

The Virginia Court held in C. & O. Ry. Co. v. McCarthy 114 Va. 181, that:

> "An objection to admissibility of evidence is not available to one who has himself elicited the same facts in the cause."

And the Virginia Court said in the N. & W. Ry. Co. V. Simmons 127 Va. 419 at p. 423:

> "If material, substantially the same evidence would have remained in the record, even if this which is objected to had been stricken out, for the companies attorney cross examined the witness, Vass, fully as to this very conversation, and elicited in such cross examination the identical evidence to which this exception relates."

And said quoting from the McCarthy case supra:

> "This court has repeatedly held that no objection to the admissibility of the evidence is available to one who has himself elicited the same facts in the cause." Citing cases.

A variance cannot be taken advantage of unless it is material. It is said in Burks Pl. & Pr. (2d Ed.) p. 586:

> "The variance* between the allegation and the proof must be in a material matter."

It is avered in the declaration that Bryant was shot after he had been discharged by the defendant's section foreman Dodson. This was certainly such averment as would put the defendant on notice that its relation to Bryant as employer and employee had terminated at the time of the shooting. Could therefore the variance between the allegation and the proof mislead the defendant in maintaining its defense? The evidence shows that it knew at the time of the shooting that Bryant had been discharged on Saturday, and how could it be prejudiced.

This court said in the case of Nash v. Towne 72 U. S. 704, 18 L. Ed. 527:

> "Undoubtedly, the rule is that the proofs must correspond with the allegament in that behalf is fulfilled, if the subtions in the declaration, but the requirestance of the declaration is proved * * * *.
>
> Recent statutes in the states also confer a liberal discretion upon courts in allowing amendments to pleadings, and those statutes, together with the change they have super-induced in the course of judicial decisions, may be said to have established the general rule in the state tri-

> bunals that no variance between the allegations of a pleading and the proofs offered to sustain it, shall be deemed material, unless it be of a character to mislead the opposite party in maintaining his action or defense on the merits. * * * Irrespective of those statutes, however, no variance ought ever to be regarded as material where the allegation and proof substantially correspond."

It was said by this Court in the case of Standard Oil Co. v. Brown 218 U. S. 77, 54 L. Ed. 934:

> "The rule is familiar and elimentary that the pleadings and proof must correspond, but a rigid exactitude is not required," And the holding in the Nash case supra was approved, and this Court further said in the case Standard Oil Co. v. Brown supra. "In the case at bar the company could not have been misled. It made no objection to the testimony of the plaintiff. It replied to it by testimony of like kind. It did not indicate in what way the proof varied from the pleadings, nor move for a continuance. Moreover, we think the pleadings, though inartifically drawn, were sufficient to notify the company that one of the grounds of action was its omission of duty to inform those whose employment made it necessary to be in the

> stable, of the danger to them of the use to which the hole was put."

In the instant case the defendant was familiar with all the facts in the case. All the witnesses were its employees. It had directed through its superintendent of tracks, Mr. Crance, to discharge Bryant on Saturday, and Dodson the defendant's section foreman said that he had discharged Bryant on Saturday two days before the shooting under the direction of Mr. Crance. And can the defendant with any fairness, or, sincerity, claim that Bryant was shot immediately after he was discharged, or, that he was not discharged until Monday morning, the day of the shooting?

It is said in defendant's brief P. 8:

> "And a demurrer to the evidence does not waive an objection to legal or incompetent evidence admitted over the demurrants motion to exclude." Citing N. & W. Ry. Co. v. Warden 117 Va. 801-804.

This Warden case supra, has no application whatever to the case at bar. In that case there was a material variance. An entirely different case was shown by the evidence from the case stated in the declaration. At the end of the trial there was a motion to strike out the evidence, and the motion was overruled. After the motion to strike out was overruled, the defendant demurred to the evidence, and was overruled. It was in substance averred in the

declaration that the plaintiff was under the influence of drink, and that the defendant's agents knowing his condition wrongfully, forcibly and negligently ejected him from the train in the dark, and threw him to the ground and dislocated one of his hips, and left him in a dangerous place. "Upon the trial the evidence introduced failed utterly to show that the plaintiff was thrown from the train and hereby injured, but it did tend to show that he was negligently left in an unsafe place and, as a proximate result, wandered about in the dark until he fell from a trestle and sustained the injuries of which he complains." The defendant moved to strike out all the evidence relative to the plaintiff being ejected from the train at an unsafe place because there was no allegation in the declaration to support it, and when the court overruled the motion to strike out this evidence, the defendant excepted and embodied it in its bill of exception No. 2. This was the only way that the exception could be made part of the record; and it is folly to claim the contrary. In the case at bar there was an objection, as above pointed out, but the objection was not on account of variance between Dodson's testimony and the allegation in the declaration, but upon entirely different grounds; and there was no bill of exception, or, certificate of exception, nor, was there any motion made to strike out the testimony. The mere noting of an objection to a question, and the overruling of the objection appearing in the notes of the evidence is not sufficient. As said in Burk's Pl & Pr. (2d. Ed.) 507:

> "The noting at intervals in stenographic notes that objections to questions were made and overruled, and exceptions taken, is not sufficient. There must be a bill or certificate of exception signed by the Judge."

We believe that it is self evident and conclusive that defendant's counsel did not believe that there was a material variance between the allegations and proof, or, he would have objected to the evidenct on account of variance, or, would have moved to strike it out, and would have made his objection a part of the record by bill, or certificate of exception. Defendant's counsel is like the squirrel that jumped from tree to tree, and from limb to limb, and finally tried to hang on to a twig with his eyelids.

II.

Did the State Courts Make Any Finding of Facts?

Defendant's counsel in his brief, page 10, claims that no such finding was made.

It has been admitted by the plaintiff throughout this case that the defendant is, and was, a common carrier by railroad engaged in commerce between the states; but it was, and is, specially denied that Bryant was in the defendant's employment in interstate commerce at the time he was shot. This was a clear cut issue of fact to be determined by

the jury, or by the court on a demurrer to the evidence. Here that issue had to be determined by the court on the evidence. The court found that Bryant was not in the employment of the defendant at the time he was shot, but had been discharged from the service two days before the shooting. Is it not perfectly clear that there is evidence in the record to sustain this finding? Could the court on the evidence have found any other way? Can it be pretended that the evidence is such that the jury could not have found for the plaintiff on this issue? If there is evidence, however, in the record upon which the jury could have found for the plaintiff, then upon a demurrer to the evidence the court was bound to so find. The Virginia Court said in the case of Addington v. Guests River C. Co. 130 Va. 584 at page 604:

> "The rule of consideration on demurrer to the evidence is succinctly stated in Milton v. N. & W. Ry. Co., 108 Va. 763, 62 S. E. 961: "If upon demurrer to the evidence, the evidence is such that the jury might have found a verdict for demurree, the court must so find, and give judgment in his favor, and further, if reasonably fair-minded men might differ upon a question, such a question must be decided against demurrant."

III.

Can It Be Pretended That This Court Has Jurisdiction to Dispose of This Action Unless Bryand at the Time He Was Shot Was in the Employment of the Defendant?

Can it be claimed here that there is no evidence in the record to sustain the finding of the State courts, that Bryant was not in the employment of the defendant at the time of the tragedy complained of? We have already poined out to the court in our opening brief, and, in this brief that there is ample evidence in the record to sustain the finding of the state courts. In fact there is no evidence to the contrary. The jury would have been bound to find on the evidence just as the courts found on the demurrer to the evidence, that Bryant was not in the employment of the defendant in interstate commerce at the time of the shooting. It can hardly be claimed by the defendant with any assurance that there is here a conclusion of law as to a Federal right and that the finding of facts are so intermingled as to make it necessary in order to pass on the Federal question to analyze the facts. There can be no Federal right involved in this case unless Bryant was in the defendants employment when the right of action accrued, and that was a question of fact to be determined by a jury or by the courts on the demurrer to the evidence.

It is sought by the defendant, erroneously, however, as we have pointed out, supra, to bring this

case under the Federal Statute by disregarding altogether the evidence showing that the discharge of Bryant occured two days before the shooting. It is so well settled, that it is useless, to cite other authorities to show that the question of Bryant's employment was a question to be determined by a jury; and here the defendant preferred to submit that question to the court on its demurrer to the evidence, and it is bound by the finding of the state courts.

IV.

The Claim of the Defendant That "The Ground Upon Which Respondent Asserts That the Judgment of the State Court Was Based, is in Substance and Effect the Decision of the Federal Right Claimed by the Petitioner."

The language petitioner's counsel uses is to us ambiguous and beclouded. The object seems, however, to be to inject into this hearing, on the plaintiff's motion to dismiss, the question as to whether or not Bryant was a trespasser. That, however, is not a question now to be determined, or as we take it, even to be considered, but as defendant's counsel states with much confidence that the uncontradicted evidence shows that the foreman Dodson had no authority to expell trespassers or to police the tracks, we will refer to it. Dodson, as shown by Mr. Crance, defendant's witness and supervisor of tracks, had authority "to look after the

companies property in general," among other duties (R. 141), and Dodson certainly had implied power to eject any agent, who might disturb defendant's section force.

This case was first decided by the full State Court, all five Judges sitting. The opinion handed down was by Judge Burks, who shortly after that, became seriously ill and died about four months later. Judge Burks was succeeded by Judge Holt, who was disqualified to sit in this case, and at the re-hearing the case was heard and disposed of by four Judges. The opinion by Judge Burks is criticised with some severity by defendant's counsel. Judge Burks was the author of Burks Pleading and Practice and other law writings, and was universally recognized as the most learned Judge and Jurist of Virginia; and we submit that no fault can be found with the reasoning and conclusion in his opinion.

It is true that the judgment of the state court of January 19, 1928, supported by the opinion of Judge Burks, was set aside and this case re-heard, but it was affirmed, although by a divided court, and it is also true that the opinion has not been officially reported, nor has it been printed in any unofficial reporter, but there is no reason why it does not stand for and show the reasoning and grounds upon which the final judgment of the state court was reached.

Defendant's counsel in his brief, page 14, quotes thus from the opinion of Judge Burks:

> "When Bryant went to the tool house on Monday morning he did not go there as a trespasser. He did not consider the discharge on Saturday as final, and on his way there said that he expected Dodson would discharge him * * * Under these circumstances Bryant can not be said to have been a trespasser in coming to the tool house, but he became such when informed of his prior dismissal and refused to leave." R. 170-1.

After making the quotation counsel for the defendant says at the bottom of page 14 of his brief: "The purpose of this reasoning was to avoid the application of the Federal Employers Liability Act." This is hardly fair, and tends to reflect on the great old Judge whose memory is sacred to all scholars and students of the law.

Bryant for years had been in the service of the defendant as a section laborer, and had been a good and faithful servant. See the testimony of Mr. Long the defendant's regular foreman (R. 159). Long had hired Bryant and had been Bryant's regular foreman ever since he had been employed by the defendant. Bryant evidently liked the service, and was loth to lave it. He was a poor laborer; had a wife and two small children to support, and he lived near his place of work. It was a desolate mountain district, where there was no place of employment near, except railroad work, and Bryant had his wife and children pulling at his coat tail

for bread. He knew that Dodson was only acting as temporary foreman, and after he was discharged on Saturday, Bryant no doubt hoped that Long would be in charge on the following Monday, and thinking this went back and offered to work. In going there he stood in the relation of one offering to hire, and his relationship to the defendant was as invitee or as a licensee. Long was not in charge on Monday morning but Dodson was, and as soon as Bryant appeared, he was reminded by Dodson that he had been discharged on the Saturday before and to get away, and Bryant did not become a trespasser until he refused to leave. As said by Judge Burks in the part of his opinion omitted in the quotation in the defendant's brief above referred to and quoted, "Dodson was only a temporary foreman and when he ordered Bryant off, the latter inquired for Long, the permanent foreman who had employed him, and informed by Dodson that Long was at home he said. I will go over and see him. He hired me, and if he wants to fire me, he can fire me." (R. 170). The fact that Bryant came back Monday morning after being discharged on Saturday and offered to work did not create the relation of Master and Servant between the defendant and Bryant, unless his services were accepted by the defendant, but his services were not accepted, and there was no mutuality between the defendant and Bryant. There is a mutuality of right between an employer and an employee in the extinguishment of the contract of employment.

> "The employer enjoys the absolute right of dismissing his employees without cause * * *, and the employee is on a plain with the employer in this respect. Every workman may quit the service of his employer at will." 18 R. C. L. 510 Sec. 21.

When Bryant came back to offer to work Monday morning he had no rights as an employee of the defendant. That relation had been severed and ended the Saturday before. When he was told to leave, his right to a rasonable time to leave was not incident to his employment, for that had been ended two days before, and the defendant is estopped to claim that Bryant was entitled to reasonable time to leave its premises as incident to his employment. It cannot be heard to make such claim to avoid liability.

The theory of the defendant's counsel, is that if Bryant was not a trespasser, then he was an employee, and that as the court found that he was not a trespasser, that then he must have been an employee of the defendant under the Federal Act, and that as incident to his employment was entitled to a reasonable time to leave the defendants premises after he had been discharged. Is it not obvious from the evidence in this case that this is a strained Monday morning and offered to work, Dodson had and impractical view? When Bryant came back on the lawful right to require Bryant to leave. Dodson was in full charge of the defendant's work, and one of his duties as said by Mr. Crance was

"to look after the companies property in general."

> "One who is lawfully in charge of premises, and has required another to leave whom he has the right to require, may lawfully use so much force as is necessary to remove such other." 3 Cyc. 145, 5 C. J. Sec. 233 p. 745, Montgomery's case 98 Va. 840.

V.

Did the Defendant Admit That Bryant Was Not in Its Employment When the Shooting Occurred?

Defendant's counsel in his brief page 18-19 admits that in the defendant's demurrer to the evidence it is stated that Bryant was discharged before he was shot; and in the fourth ground of the demurrer to the evidence, it is specifically stated (R. 160) "That the plaintiff's intestate was discharged from the defendant's employment on Saturday prior to the Monday of the shooting complained of;" and in the defendant's seventh ground of demurrer (R. 161), it is stated "that the shooting of said intestate by said Dodson was entirely separated in point of time and occasion from said intestate's discharge from the defendant's employment. These statements are inconsistent with the theory that Bryant was in the employment of the defendant at the time of the shooting, but defendant's counsel undertakes to justify these inconsist-

ent statements under Section 6107 of the Code of Virginia, 1919, which provides that, "the defendant in any action may plead as many several matters, whether of law or fact, as he shall think necessary, and he may file pleas in Bar at the same time with pleas in abatement, or within a reasonable time thereafter."

At common law the defendant was allowed to plead but one matter of law or fact; he could demurrer or plead, but he could not do both. Our Statute to remedy this followed the English Statute, and the English courts refused to allow inconsistent pleas to be filed, but our Courts, it is true, have held, and it is settled in our state, that inconsistent pleas are allowable, but it is well settled that this only applies to the defendant's pleas to the declaration, and does not apply to any subsequent pleading. It is said in Burks Pleading and Practice (2d. Ed.), 325:

> "It will be observed that the Virginia Statute, like the English Statute, uses the word 'plead' in a technical sense, and hence it applies only to the defendants answer to the plaintiffs declaration, and does not apply to the replication, rejoinder, or any subsequent pleading; as to the replication, rejoinders, and all subsequent pleadings, the common law rule prevails in Virginia, and the pleader can make but one answer, whether of law or fact, to the antecedent pleading. He may demur or he may answer in fact, but he cannot do both."

The Virginia Court said in C. & O. Ry Co. v. American Exchange Bank 92 Va. 495 at p. 498:

> "But as to subsequent stages of the pleading, there has been no change in the common law. The plaintiff can make one answer, either of law or of fact, but no more, to each plea." Citing Lang v. Lewis 1 Ran. (Va.) 277, and 4 Minors Inst. 166-7 3rd. Ed.

We submit that it is clear and obvious that Section 6107 of the Code of Virginia, 1919, has no application whatever to the grounds stated in a demurrer to the evidence. Moreover it was not necessary for the defendant to state in its grounds of demurrer that Bryant had been discharged "on Saturday prior to the Monday of the shooting," or that the shooting was entirely separate in point of time from Bryant's discharge. These statements were made because the evidence clearly shows that these statements are correct. Defendant's counsel has apparently taken the position throughout this case that because he pleaded facts that bring the case under the Federal Statute that this is sufficient to bring this case under the Federal Employers Liability Act although there is no evidence to sustain the plea. On this theory any case could be brought by a defendant within the jurisdiction of the United States Courts. It is very clear, however, that the mere averment of facts cannot give the United States Courts jurisdiction unless sustained by the

evidence. As said by his Court in the case of Sawyer v. Piper 189 U. S. 157, "that the mere averment of such a question is not sufficient."

VI.

Conclusion.

We respectfully submit that this case does not come under the perview of the Federal Employers Liability Act, and that this Court has no jurisdiction, and that the plaintiff's motion ought to be susained.

Respectfully submitted,

CHARLES CURRY,
For Respondent, R. L. Bryant, Administrator of the Estate of M. L. Bryant, Deceased.

R. B. STEPHENSON and
CURRY CARTER, of Counsel.